TAN YEW BENG

v.

PUBLIC PROSECUTOR

HIGH COURT, SINGAPORE
KS RAJAH JC
[MAGISTRATE'S APPEAL NO. 103/91/01]
18 OCTOBER 1991

CRIMINAL PROCEDURE: *Charge under s. 420 Penal Code - Dishonest inducement - Payment made on purported contract for sale of plywood and sawn timber and three delivery orders - False documents - Appeal against conviction and sentence.*

The appellant was authorised by LKF industries Pte. Ltd. (LKF), to act on its behalf. In April 1988 the appellant spoke to Gordon Toh of Far East of Kaines (UK) Ltd., about discounting a guaranteed payment from a Chinese Communist bank. Gordon Toh told the appellant that the People's Construction Bank of China (PCBC) was acceptable.

Lin Xue Feng, a freelance broker had dealings with LKF. He also acted as a broker for Deng Guohua. Some time between February and April 1988 Deng Guohua asked Lin Xue Feng to sign a contract for LKF with Shenzhen North South Industries (SNSI). A sale and purchase contract was finally executed on 25 May 1988 for the sale of plywood amounting to US$7.96 million. The buyer obtained a letter of guarantee issued by a bank to secure payment of up to US$7,960,000 for the payment of cargo to be delivered by the seller (LKF) to the buyer (SNSI). The guarantee was available for negotiation against LKS's draft drawn on PCBC.

On 5 June 1988 the contract, letter of guarantee and power of attorney were handed over to the appellant by Lin Xue Feng and the appellant was also told about the scheme to cheat the Chinese.

On 23 June 1988 the relevant documents drawn up by LKF on PCBC were presented to Kaines in Singapore for onward transmission to London. On 4 August 1988 Kaines paid LKF on amount of US$11,253,438.22. Approval was given by Kaines's head office in London to discount the letter of guarantee upon successful negotiation of the documents.

In June 1989, the Bill of Exchange, upon their maturity were sent to PCBC for payment. PCBC was unable to pay as their funds were frozen.

The prosecution made out a *prima facie* case against the appellant. When defence was called he elected to remain silent. The appellant was sentenced to 5 years imprisonment.

Held:

[1] A bill discounting facility is a form of advance granted to the seller. The security is not entirely in the goods to be delivered by the seller. The undertaking given by PCBC in its letter of guarantee was the security in this case. It was available for negotiation against LKF's draft drawn on and accompanied with the inspection certificate countersigned by the buyer to the effect that LKF as seller had fulfilled the terms and conditions under the contract. LKF had not fulfilled the terms and conditions, but Kaines was deceived into believing that the goods had been delivered by the inspection certificate, delivery order and bills of exchange drawn by LKF on PCBC.

[2] The payments to LKF were sanctioned by Kaines and were made by Kaine, not Gordon Toh, only after the reports and negotiating documents had been obtained from their officers in Singapore. The documents were handed over to Gordon Toh by the appellant. The

payments were made by Kaines only because the appellant had submitted the documents. If Gordon Toh had knowingly submitted documents that were false, he would be guilty of abetting the appellant for supporting the false representation. No allegations of that kind had been made nor is there any evidence implicating Gordon Toh. The trial Judge found Gordon Toh was deceived because he did not know the documents were false.

[3] When property is delivered by a person who is cheated there must always be a stage when the person makes up his mind to give the property. On accepting the false representation made to him Kaines made up its mind after seeing the relevant documents which included the inspection certificate and delivery orders. Kaines did not make up its mind when the appellant told Gordon Toh that LKF needed short-term financing in April or in early June 1988.

[4] The transaction did not begin on 23 June 1988 and end on 4 August 1988. The question in each case would be whether the events form part of the same transaction. The material dates whether it is for the prosecution or the defence must be whether the acts on the particular date whether before or after the dates form part of the transaction with which the appellant has been charged.

[5] The sentence of 5 years imposed on the appellant is not manifestly excessive.

[Appeal against conviction and sentence dismissed.]

Case referred to:
Bakhshish Singh Dhaliwal v. The State of Punjab [1967] AIR SC 752 ***(cit)***

Legislation referred to:
Penal Code [Sing], ss. 415, 420

For the appellant - Peter Yap
For the respondent - Roy G Neighbour (*Hamidul Haq with him*)

JUDGMENT

KS Rajah JC:

The appellant, Tan Yew Beng was charged:

> You, Tan Yew Beng
>
> NRIC No. 1094786-C,
>
> are charged that you, on a day between 23 June 1988 and 4 August 1988 in Singapore, deceived Kaines (UK) Ltd. (Kaines), into believing that:
>
> (a) an inspection certificate referred to in a letter of guarantee No. 88002 for Contract Number 88-A-0034 dated 25 May 1988 between Shenzhen North South Industries Ltd., as purchasers and LKF Industries Pte. Ltd. (LKF), as sellers, being understood by Kaines to be an ex warehouse contract for the sale of 15 000 m3 of plywood and 13 724.2 m3 of sawn timber, purporting that an inspection had taken place and,
>
> (b) three delivery orders Nos. 0061, 0062 and 0066 in respect of the above contract, purporting that delivery had taken place ex warehouse,
>
> were true when you knew they were not, thereby dishonestly inducing Kaines to present three bills of exchange valued at US$7,420,900 to the People's Construction Bank of China for its acceptance and upon acceptance, thereby to deliver to LKF Industries Pte. Ltd., US$11,253,438.22 after discounting the said bills of exchange which Kaines would not have done had it not been so deceived, and you have thereby committed an offence punishable under s. 420 of the Penal Code, Cap. 224 (1985 Revised Edn.).

This appeal is against conviction and sentence on that charge. The facts which are relevant to this appeal can be briefly stated.

The appellant was a founder director of M/s. Beng Beng Edible Oil Industries (S) Pte. Ltd. [BBEO], which was incorporated in 1982. In 1984 the appellant resigned as a director from BBEO. In 1985 he was adjudged a bankrupt after he had failed to pay a judgment debt of US$3,792,035.62. On 3 June 1986 the name of the company, BBEO, was changed to LKF Trading Pte. Ltd. Four months later, on 6 October 1986, the name of LKF Trading Pte. Ltd., was changed to LKF Industries Pte. Ltd. (LKF).

Although the appellant had resigned as a director, he maintained his connections with LKF and was authorised to act on behalf of LKF. LKF passed various resolutions to enable the appellant to act on its behalf.

On 12 September 1986, Kaines was registered as a branch office of a foreign company in Singapore. Its principal activities included "drawing, making, accepting, endorsing, negotiating, discounting or executing promissory notes, bills of exchange and other negotiable or transferable instruments".

Gordon Toh was the associate director, Far East of Kaines (UK) Ltd. Between 2 October 1986 and 14 July 1987, about 5 to 7 business dealings between Kaines and LKF took place. Initially the dealings dealt with one or two simple discounting of letters of credit and back-to-back letters of credit financing. In many instances, it was a case of a seller wishing to sell a certain product to a buyer without the supplier of the goods to the seller knowing the actual price and the end buyer. Kaines bought commodities from the appellant for their London office on one or two occasions.

In April 1988 the appellant spoke to Gordon Toh and asked if Kaines was interested in discounting a guaranteed payment from a Chinese Communist Bank. The credit standing of Chinese banks was discussed in general terms. Gordon Toh checked with his head office in London and told the appellant that the People's Construction Bank of China [PCBC] was acceptable.

The Hong Kong Connection

Lin Xue Feng is a man of many parts. He has a Thai name and a Thai passport. He went to Thailand using his Chinese passport. He is also a national of the Kingdom of Tonga and has a passport from the Kingdom of Tonga. He also had a Filipino passport and a Filipino name. He has had dealings with LKF. He had also acted as a broker for Deng Guohua.

Deng Guohua is a Hong Kong national. Lin Xue Feng, a freelance broker, first heard of the appellant's name in Deng Guohua's office in Hong Kong some time in March or April 1988. He was aware that there were telephone calls and faxes between the appellant and Deng Guohua. Some time between February and April 1988, Deng Guohua asked Lin Xue Feng to sign the contract for LKF in Shenzhen, in China. Deng Guohua also told him that he had spoken to Shenzhen North South Industries [SNSI] and told them that Lin Xue Feng would be representing LKF. Deng Guohua gave various documents issued by LKF to Lin Xue Feng for SNSI when he signed the contract. Deng Guohua also gave Lin Xue Feng, besides the other documents, a format of the letter of guarantee which SNSI as purchaser was required to obtain from the bank. The sale and purchase contract was executed on 24 March 1988. The contract, for various technical reasons, was amended and another contract dated 23 May 1988 was prepared. The final contract was dated 25 May 1988, after certain errors were put right.

The contract was titled Contract No. 88-A-0034 for the sale of 20,000 m3 of plywood. The total price was USUS$7,960,000. The buyer obtained a letter of guarantee issued by a bank to secure payment of up to USUS$7,960,000 for the payment of cargo to be delivered by the seller (LKF) to the buyer (SNSI).

The guarantee was available for negotiation against LKF's draft drawn on PCBC and accompanied by an inspection certificate countersigned by SNSI to the effect that the seller had fulfilled the terms and conditions under Contract No. 88-A-0034. The irrevocable letter of guarantee dated 26 May 1988 was issued by PCBC Shenzhen branch. The guarantee was issued subject to Uniform Customs and Practice for Documentary Credits, 1983 Revision, ICC Publication IN 400. Lin Xue Feng was also given a power of attorney by SNSI to inspect the goods on behalf of SNSI. For purposes of this appeal, it is not necessary to go into the facts that led to Lin Xue Feng being given the power of attorney and other events that took place in China.

Cheat the Chinese

Lin Xue Feng returned to Hong Kong on or about 27 May 1988 and handed over the documents to Deng Guohua. Deng Guohua told Lin Xue Feng that there was a scheme to cheat the Chinese as there was no intention to deliver all the goods mentioned in the contract. The money received was to be shared amongst various people. LKF would be one of the persons entitled to a share of the monies that would be received for goods that would not be delivered. Lin Xue Feng was also told that all of the arrangements had already been made and he was instructed to take the documents to Singapore and hand them over to the appellant.

On 5 June 1988, the contract, letter of guarantee and the power of attorney were handed over to the appellant in Singapore by Lin Xue Feng. On that occasion, Lin Xue Feng told the appellant that Deng Guohua had told him that there was a scheme to cheat the Chinese. On 9 June 1988 Lin Xue Feng and the appellant visited a timber factory in Malaysia after the appellant had made the necessary arrangements for the visit. The appellant had also told the person who managed the timber factory that he wanted to purchase 3,000 m3 of plywood. When the appellant and Lin Xue Feng were at the timber factory, photographs were taken of Lin Xue Feng at the production line, warehouse and storage area.

On 10 June 1988, after the appellant and Lin Xue Feng had returned to Singapore, Lin Xue Feng was given copies of the photographs that had been taken at the timber factory in Malaysia and was asked to sign an inspection certificate that was produced by the appellant. The appellant also asked for Lin Xue Feng's passport saying that the inspection certificate and photocopy of the passport had to be handed to the bank. Lin Xue Feng signed the inspection certificate which was to the effect that an inspection had taken place of 13,800 m3 of plywood and 13,300 m3 of sawn timber, and that the goods were found to be in good order and condition and in accordance with Contract No. 88-A-0034 between SNSI (buyer) and LKF (seller) and that the signatory was empowered by SNSI to sign the inspection certificate under Contract No. 88-A-0034.

Lin Xue Feng also signed 3 delivery orders addressed to SNSI in which he acknowledged that delivery had taken place at the buyer's (SNSI) warehouse at Port Klang on or about 11 or 12 June 1988. The delivery orders were signed in the presence of the appellant after Lin Xue Feng had been told that the documents had to be submitted to the bank.

On 23 June 1988, the inspection certificate, delivery orders and bills of exchange drawn up by LKF on PCBC for USUS$2,897,440, USUS$2,594,960 and USUS$1,928,500 were presented to Kaines in Singapore for onward transmission to London. The cost invoice and delivery orders were given to Kaines on 6 July 1988.

The bills of exchange were sent by Kaines through the Bank of New York to PCBC to accept the bills of exchange on 7 July 1988. The formal written offer was made to LKF by Kaines on 8 July 1988. The offer was accepted by the appellant on behalf of LKF on the same day. PCBC accepted the bills of exchange on 14 July 1988 and returned them to Kaines at the end of July 1988. Kaines then paid LKF a total of US$11,253,438.22 on 4 August 1988. Approval was given by Kaines' head office in London to discount the letter of guarantee upon successful negotiation of the documents.

Freeze the Drafts

In June 1989, the bills of exchange, upon their maturity, were sent to PCBC for payment. PCBC did not respond and finally sent a letter stating that PCBC was unable to pay as there was a Court order "to freeze the drafts". Subsequently PCBC said there would be no payment because their funds were frozen.

Gordon Toh's Evidence

Special reference must be made to a piece of evidence on which the defence relied in the Court below. In early June 1988 the appellant picked up the threads of his April discussion with Gordon Toh about discounting guaranteed payments from Chinese banks and told Gordon Toh that LKF had a letter of guarantee for negotiation for which he needed financing or discounting. The proceeds of the discounting were to be used to pay for the cargo which LKF had contracted to sell to SNSI. The defence was that before the presentation to Kaines of the false inspection certificate, the appellant had disclosed to Gordon Toh that LKF had not yet obtained the goods and that they needed Kaines' financing or discounting to pay for the goods. Gordon Toh gave evidence to the effect that because of the disclosures made to him in early June 1988, he was not misled by the inspection certificate, but, Gordon Toh also gave evidence to the effect that had he known that any of the documents handed by the appellant to him were false, he would not have recommended and proceeded with the transaction.

In his grounds of decision, the trial Judge has said:

> ..., just because Gordon Toh had been told earlier on that LKF did not have the means to pay their suppliers and needed the discounted proceeds from Kaines before they could pay their suppliers, it did not follow that when Gordon Toh received the inspection certificate and delivery orders he knew or should have known that they could not have been true.

It was not disputed that the documents that were submitted to Kaines were false and that Kaines paid LKF US$11,253,438.22.

The defence submitted that a *prima facie* case against the appellant had not been made out because the prosecution had failed to prove that the appellant had deceived Gordon Toh. The appellant should accordingly be acquitted on the ground that Kaines was not deceived by the false documents because Kaines could not be misled when Gordon Toh was not misled.

The learned district Judge was satisfied that the appellant wanted to deceive Kaines into believing that the inspection certificate and the 3 delivery orders were true when he knew they were not true and thereby dishonestly induced Kaines to present the bills of exchange that had been drawn pursuant to the letter of guarantee to PCBC.

When the defence was called, the appellant elected to remain silent. He did not call any witnesses and no further submissions were made. The learned district Judge found no reasonable doubt had been raised as to the truth of the prosecution's case or as to the guilt of the appellant. The appellant was found guilty and convicted.

The plea in mitigation centered around the fact that the appellant had every intention of supplying SNSI with as many shipments as possible of the goods that he was obliged to supply under the contract and that the failure to do so only arose because of difficulties between the appellant and his boss. It was also said in mitigation that the appellant had given assistance to the prosecution.

The learned district Judge sentenced the appellant to 5 years' imprisonment. He took into account the sum that was involved, the planning that had taken place before the scheme was put into effect and the steps taken to conceal the commission of the offence. The appellant had played a major role in the whole scheme.

The Appeal

The decision of the trial Judge was attacked, on appeal, mainly, on the ground that the trial Judge had erred in both law and in fact in failing to consider whether Gordon Toh had been deceived. If Gordon Toh had not been deceived, then the prosecution would have failed to discharge the burden of proof placed on the prosecution. In support of the primary argument that Gordon Toh must be deceived, the appellant relied on the fact that discounting was effected on 4 August 1988 and subsequent to that date, the appellant had delivered goods valued at approximately US$1 million to the buyers in 2 shipments.

Put simply, the issue was whether Gordon Toh knew there were not only no goods but also that the inspection as stated in the inspection certificate was false and that no delivery of goods to the warehouse at Port Klang had taken place. If the authorised representative was not deceived, Kaines in London could not be deceived by the appellant who only dealt with Gordon Toh.

The weakness in the argument rests in a failure to appreciate the commercial context in which Gordon Toh was giving evidence. Gordon Toh was not told all the facts.

A bill discounting facility is a form of advance granted to the seller. The security is not entirely in the goods to be delivered by the seller. The undertaking given by PCBC in its letter of guarantee was the security in this case. It was available for negotiation against LKF's drafts drawn on and accompanied with the inspection certificate countersigned by the buyer to the effect that LKF as seller had fulfilled the terms and conditions under Contract No. 88-A-0034. LKF had not fulfilled the terms and conditions, but Kaines was deceived into believing that the goods had been delivered by the inspection certificate, delivery order's and bills of exchange drawn up by LKF on PCBC.

The payments to LKF were sanctioned by Kaines and were made by Kaines, not Gordon Toh, only after the reports and negotiating documents had been obtained from their officers in Singapore. This included the letter of guarantee, inspection certificate, delivery orders and bills of exchange handed over to Gordon Toh by the appellant. The payments were made by Kaines, not Gordon Toh, only because the appellant had submitted the documents. If Gordon Toh had knowingly submitted documents that were false, he would be guilty of abetting the appellant for supporting the false representations. No allegation of the kind has been made nor is there any evidence implicating Gordon Toh. The trial Judge found Gordon Toh was deceived because he did not know the documents were false.

When property is delivered by a person who is cheated, there must always be a stage when the person makes up his mind to give the property on accepting the false representations made to him. (See *Bakhshish Singh Dhaliwal v. The State of Punjab* [1967] AIR SC 752) Kaines made up its mind after seeing the relevant documents which included the inspection certificate and delivery orders. Kaines did not make up its mind when the appellant told Gordon Toh that LKF needed short-term financing in April or in early June 1988.

The next question is whether at the time of obtaining the money, the appellant intended to deliver the goods to SNSI and afterwards breached his contract so that he is liable only for a civil action for breach of contract. The evidence is to the effect that the appellant was involved in a scheme spread over a number of countries to cheat the Chinese. LKF did not fulfil the contract even after Kaines had made payment. Illustration (g) to s. 415 of the Penal Code provides:

> (g) A intentionally deceives Z into a belief that A means to deliver to Z a certain quantity of pepper which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats; but if A, at the time of obtaining the money, intends to deliver the pepper, and afterwards breaks his contract and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.

The appellant's case is that he did not deceive Gordon Toh. There is no credible evidence to the effect that at the time of obtaining the money, LKF intended to deliver the cargo to SNSI. The appellant earned the confidence of Kaines with a few transactions. The 2 shipments were considered by the trial Judge who found as a fact that there was no intention to deliver the plywood and sawn timber. It is not a perverse finding of fact. It was also submitted that the prosecution had to prove deception took place between 23 June 1988 and 4 August 1988 as charged.

The short answer to that submission is that the transaction did not begin on 23 June 1988 and end on 4 August 1988. The question in each case would be whether the events form part of the same transaction.

Defences

A person charged with cheating is entitled to set up inconsistent and alternative pleas. He may deny the allegations made against him by the prosecution and give his own version and ask the Court to accept it. He may admit the facts alleged by the prosecution and may either tender his own explanation which if found to be reasonably true may be accepted by the Court. He may contend that on the facts alleged against him no criminal offence is disclosed. He may plead absence of dishonest intention on his part or that the necessary ingredients of the offence as defined in the Code are absent.

He may also contend that he has not made any false representations or that the complainant did not rely upon or was not influenced or induced by his representations; or that the acts did not amount to cheating but a breach of contract.

The material dates whether it is for the prosecution or the defence must be whether the acts on the particular date whether before or after the dates form part of the transaction with which the appellant has been charged. I reject the submission with regard to the dates.

The seller in this case not only relied on a letter of guarantee but also accepted the condition that the terms of the guarantee would be honoured not before 330 days after the date of the inspection certificate. The seller had ample time to fulfil his side of the bargain.

It was finally submitted that the appellant was at the highest only liable for an offence of using false documents, an offence under s. 471 of the Penal Code which punishes a person for using as genuine a document which he knows to be forged. Kaines was deceived by the false documents and delivered property to the appellant. I reject the submission as this is not a case of merely preparing a false document or using a false document.

The conviction of the appellant for the offence under s. 420 of the Penal Code (Cap. 224) in the circumstances is in no way vitiated.

I now turn to the question of sentence.

It was submitted that the sentence imposed was manifestly excessive because the trial Judge drew certain conclusions not borne out by the evidence. The failure on the part of the appellant to profit from the transaction was wrongly dismissed since there was no evidence to show how the appellant had profited from the transaction.

The facts set out speak for themselves. The trial Judge considered all the matters for and against the appellant before imposing sentence.

Lin Xue Feng, the accomplice, was sentenced to imprisonment for one year. He had an important role. He was charged on a different occasion before a different Court. He was sentenced to a year's imprisonment after he pleaded guilty. The Court before whom Lin Xue Feng appeared was entitled to take his plea of guilt and the assistance he gave to the enforcement agencies into account. In the circumstances, I am unable to say that the sentence of 5 years imposed on the appellant is manifestly excessive. The appeal against conviction and sentence is dismissed.

Also found at [1992] 1 CLJ 751